

United States  
Circuit Court of Appeals

For the Ninth Circuit.

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J. M. DUNGAN and EUNICE DUNGAN, His  
Wife,

Appellants,

vs.

POTLATCH LUMBER COMPANY, a Corpora-  
tion,

Appellee.

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Transcript of Record.

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Upon Appeal from the United States District Court for the  
Eastern District of Washington, Northern Division.

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FILED

JUL 1 - 1960

PAUL P. O'BRIEN,  
CLERK



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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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GRAY & POTTS, Coeur d'Alene, Idaho,  
Attorneys for Defendant. [1\*]

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In the Superior Court of the State of Washington,  
in and for the County of Spokane.

L.—4493.

No. 83,295.

J. M. DUNGAN and EUNICE DUNGAN, His  
Wife,

Plaintiffs,

vs.

POTLATCH LUMBER COMPANY, a Corpora-  
tion,

Defendant.

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\*Page-number appearing at the foot of page of original certified  
Transcript of Record.

## COMPLAINT.

Filed Dec. 3, 1928. Harry M. Lucas, Clerk. W. C. Steinmetz, Deputy.

Plaintiffs complain of defendant and for cause of action allege:

## I.

That at all the times herein mentioned plaintiffs were and now are husband and wife.

## II.

That at all the times in this complaint mentioned defendant was and now is a corporation, organized and existing under and by virtue of the laws of the State of Maine.

## III.

That on or about the 28th day of November, A. D. 1925, plaintiffs and defendant made and executed a contract in writing, a copy of which marked Exhibit "A," is hereto attached and made a part of this complaint.

## IV.

That all the White Pine timber designated therefor in said contract was, prior to the 12th day of August, 1928, cut into lumber and delivered to and received and accepted by defendant; and all other terms and conditions of said contract, upon performance of which final payment for lumber manufactured and delivered thereunder is conditioned, have been fully performed by plaintiff. [2]



## V.

That the total amount of lumber so cut, manufactured and delivered to defendant under said contract was 6,857,307 feet, of which 4,687,063 feet was delivered to and accepted by defendant during the years 1926 and 1927, and the defendant has fully paid therefor as stipulated in said contract, save and except that of the stipulated purchase price, namely, \$32.50 per thousand feet, defendant pursuant to the terms and conditions of said contract, withheld and now withholds, the sum of \$1.00 per thousand feet as a guarantee for performance by defendant of the requirements of the laws of the State of Idaho for the burning of brush on the lands of which said timber was cut and removed, namely, the sum of \$4,687.06, which amount now remains due, owing and unpaid.

## VI.

That on and between the — day of May, 1928, and the 12th day of August, 1928, plaintiffs delivered to defendant and defendant received and accepted 2,170,244 feet of lumber so manufactured by plaintiffs as aforesaid, for which defendant by the terms of said contract became obligated to plaintiffs in the sum of \$70,532.93, no part of which has been paid, save and except the sum of \$57,149.28 to plaintiffs and the sum of \$2,762.50 to laborers for burning of brush on the lands described in said contract, totalling \$59,911.78 and that a balance of \$10,621.15 remains due, owing and unpaid.

WHEREFORE plaintiffs pray judgment against defendant for the sum of \$15,308.21, with interest

thereon at the legal rate from the 12th day of August, 1928, together with their costs and disbursements herein expended.

O. C. MOORE,

Attorney for Plaintiffs. [3]

J. M. Dungan, being first duly sworn, on oath deposes and says: That he is one of the plaintiffs in the above-entitled action, that he has read the foregoing and attached complaint, knows the contents thereof, and that same is true as he verily believes.

J. M. DUNGAN.

Subscribed and sworn to before me this 20th day of November, 1928.

W. R. SAMPSON,

Notary Public in and for the State of Washington,  
Residing at Spokane, Washington. [4]

### EXHIBIT "A."

#### LUMBER CONTRACT.

THIS CONTRACT, Made and entered into in duplicate this Twenty-eighth day of November, A. D. 1925, by and between J. M. DUNGAN and EUNICE E. DUNGAN, his wife, of Spokane County, State of Washington, the parties of the first part, and POTLATCH LUMBER COMPANY, a corporation organized and existing under and by virtue of the laws of the State of Maine and authorized to do business in the State of Idaho, the party of the second part: WITNESSETH, That

WHEREAS, the parties of the first part are the owners in fee simple, free from all incumbrance, and entitled to sell all of the merchantable White Pine timber, logs and lumber situate and being upon the lands and premises in Latah County, State of Idaho, particularly described as follows, to-wit:

The Northeast Quarter ( $NE\frac{1}{4}$ ), the East Half of the Northwest Quarter ( $E\frac{1}{2}NW\frac{1}{4}$ ), and the North Half of the Southeast Quarter ( $N\frac{1}{2}SE\frac{1}{4}$ ) of Section Nineteen (19), in Township Thirty-nine (39) North, Range One (1) East of the Boise Meridian, containing Three Hundred Twenty (320) acres, more or less; and

WHEREAS, the parties of the first part are at this time negotiating for the acquisition of other tracts of timber in Latah County, Idaho, particularly described as follows, to-wit:

The Southeast Quarter of the Southeast Quarter ( $SE\frac{1}{4} SE\frac{1}{4}$ ), of Section Thirteen (13), and the Northeast Quarter of the Northeast Quarter ( $NE\frac{1}{4} NE\frac{1}{4}$ ) of Section Twenty-four (24), Township Thirty-nine (39) North, Range One (1) West of the Boise Meridian, and Lots Four (4), Five (5) and Six (6) and the Northeast Quarter of the Southwest Quarter ( $NE\frac{1}{4} SW\frac{1}{4}$ ) of Section Nineteen (19), and the East Half of the Southwest Quarter ( $E\frac{1}{2} SW\frac{1}{4}$ ) and the West Half of the Southeast Quarter ( $W\frac{1}{2} SE\frac{1}{4}$ ) of Section Eighteen (18), and a small body of timber lying south of a divide in the Southeast corner of the

Southeast Quarter of the Southwest Quarter (SE $\frac{1}{4}$  SW $\frac{1}{4}$ ) and in the Southwest corner of the Southwest Quarter of the Southeast Quarter (SW $\frac{1}{4}$  SE $\frac{1}{4}$ ) of Section Eighteen (18), all in Township Thirty-Nine (39) North, Range One (1) East of the Boise Meridian, containing Four Hundred Twenty-five (425) acres, more or less; and

WHEREAS, The parties of the first part may, in the near future acquire 160 acres of timber more in Section Twenty-four (24), Township Thirty-nine (39) North, Range One (1) West of the Boise Meridian, Latah County, Idaho, and other White Pine timber and timber land contiguous or adjacent to the aforesaid land, and [5] within the same logging chance or operation; and

WHEREAS, All timber above described constitutes one compact body and one logging chance or operation, and is all tributary to a saw-mill and log pond which the parties of the first part will forthwith erect and build, or cause to be erected and built, on the Northwest Quarter of the Northeast Quarter (NW $\frac{1}{4}$  NE $\frac{1}{4}$ ) of Section Nineteen (19), Township Thirty-nine (39) North, Range One (1) East of the Boise Meridian, Latah County, Idaho.

NOW, THEREFORE, THIS CONTRACT FURTHER WITNESSETH, That the parties of the first part hereby agree to sell to second party, free from incumbrance, in consideration of the compensation hereinafter specified, and by these presents do hereby agree to cut, manufacture, haul,

deliver to and load upon the trucks of second party, in the mill yard of second party at Elk River, Idaho, at points therein to be designated by it, or its agent, all the White Pine timber standing upon the above described premises, now owned by first parties and which they may acquire during the life of this contract, as aforesaid, which will cut to Grade No. 3 Common or better, rough Idaho White Pine lumber; provided, that Grade No. 3 Common shall not exceed 25% of the total cut and delivery; and provided further, that all logs shall be cut into lumber before they shall have deteriorated by reason of fungus or other disease or atmospheric conditions; and second party hereby agrees to purchase such lumber from first parties for the price and upon the terms herein set forth, and each and all of the terms and conditions of this contract shall apply to and cover all of said lands and the White Pine timber thereon, which may be purchased by first parties during the life of this contract, as fully as to the lands and timber thereon, now owned by first parties and first above particularly described. The total estimated amount of White Pine lumber covered by this contract is Nine Million (9,000,000) feet, board measure, more or less, and in any event all of the merchantable White Pine lumber which will meet the specifications herein required for lumber, and which can be cut and manufactured from all the White Pine Timber upon the [6] aforesaid land.

Second party agrees to pay and the first parties agree to accept for said lumber Thirty-two and 50/-

100 Dollars (32.50) per thousand feet, board measure.

Said purchase price shall be paid for such lumber hereinbefore specified upon delivery and loading on lumber trucks of party of the second part, as aforesaid, and subject to the conditions herein contained, as follows: Second party shall pay Thirty-one and 50/100 Dollars (\$31.50) per thousand feet, board measure, for such lumber as shall have been delivered during the preceding calendar month, as herein specified, according to the scale bill rendered by the scaler or grader as herein provided, such payment of Thirty-one and 50/100 Dollars (\$31.50) per thousand feet, board measure, to be made monthly on or before the eighth day of the calendar month following delivery; Provided, however, that first parties shall not deliver any lumber as aforesaid during any portions of the months of December, January, February and March of any year, during which the mill of second party at Elk River is not operating. Final payment shall be made subject to the following conditions:

First parties hereby agree to furnish at their own cost and expense all labor, assistance, equipment and supplies required in cutting, manufacturing, hauling and delivering the lumber furnished under this contract, and before the payment of Thirty-one and 50/100 Dollars (\$31.50) per thousand is made as herein provided, first parties shall furnish evidence to the satisfaction of second party that all claims for labor, assistance and supplies accrued, contracted for, and/or incurred in carrying out the

terms of this contract have been paid, and that there are no liens for labor, assistance or supplies of record against said lumber or any portion thereof and, before final payment is made, that the time for filing liens against said lumber for labor, assistance and/or supplies has expired.

It is agreed that during the entire term of this contract and of any and all extensions or continuations of such term, whether verbal, written or implied, first parties shall at their own cost and expense in all respects comply with the requirements of Chapter [7] 150 of the Idaho Session Laws of 1925, as well as with all other laws of the State of Idaho relating to the prevention, detection or suppression of forest fires, and hereby agree to save second party harmless from any and all penalties provided by statute for the failure of first parties to so comply with the law, as well as from any and all damages arising from damage to others through the escape of fires from any of the land or property above referred to, to the land of such other, which damage could be legally chargeable to the lumber purchased by second party.

It is further agreed that, for the purpose of guaranteeing full compliance with the requirements of said laws and the payment of said damage, second party shall withhold from any sum or sums due from final payment to first parties under this contract the sum of One Dollar (\$1.00) per thousand feet for all White Pine Lumber covered by and cut, manufactured, hauled and delivered under the terms and provisions of this contract, anything

herein to the contrary notwithstanding, and retain the same until first parties shall have produced Certificates of Clearance from the State Forester or Fire Warden of the District certifying that all the requirements of the aforesaid laws of the State of Idaho have been fully complied with and that no fire has escaped from any of the property herein referred to, to the land or timber of another.

It is further agreed that if, through the violation of any of the laws of the State of Idaho above referred to, or otherwise, any expense shall have been incurred on behalf of the State of Idaho, or of any officer or agent thereof, in carrying out any requirements of any of the laws of the State of Idaho, or which, under any law of the State of Idaho, may become in any manner chargeable to second party as purchaser of said lumber, or which may become chargeable to or a lien upon said lumber so cut and delivered by first parties hereunder, then the said sum herein provided to be withheld and retained by second party as a guarantee of such compliance by first parties, with all the requirements of the laws of the State of Idaho and all damage through the escape [8] of fires as aforesaid, or so much thereof as may be necessary, shall be available for and may be used by second party for the purpose of paying such expense so chargeable to second party, or to said lumber, unless first parties shall produce receipts showing the payment of all such claims, or to the satisfaction of second party guarantee their payment. And such sums may be retained by second party until all such expenses,



claims and/or damages have been fully determined by the officers of the State of Idaho, under whose supervision the matter comes, through agreement of the parties, or the determination by order or decree of a court of competent jurisdiction having jurisdiction of the parties and of the subject matter.

All lumber cut, manufactured, hauled and delivered as herein specified, shall be in strict accordance with written specifications and directions of the party of the second part attached hereto and made a part hereof, subject, however, to changes from time to time by second party, it being understood between the parties hereto that approximately Seventy-five per cent of the lumber manufactured hereunder shall be sawed to a full  $8\frac{1}{4}$  thickness,—that is,  $2\frac{1}{8}$  inches.

First parties further agree to furnish Abstracts of Title brought down to date showing good and sufficient titles in fee simple, free of incumbrances, to all the land and timber herein described, including all lands and timber to be hereafter acquired and which are covered by the terms and conditions of this contract, and their right to sell said lumber to said second party.

First parties further agree to protect the second party from any damage or damages which may accrue in any manner whatsoever through the cutting, manufacturing, hauling, or delivering of said lumber.

First parties further agree to, at their own cost and expense, secure all necessary privileges to cross

the lands between the property above described and the point of delivery specified, and to assume all risk, damages and liability arising from and through their failure to do so. [9]

First parties hereby warrant and agree to forever defend each and every covenant herein contained and more especially that the first parties are the owners of and entitled to sell, free from incumbrance, the aforesaid lumber, and further agree that each and every of the covenants on their part to be performed will be well and truly performed, and that the lumber herein referred to will all be delivered as aforesaid on or before the Thirty-first day of December, A. D. 1928.

All agreements and covenants herein are contingent upon acts of God, strikes, and other causes beyond control of either party hereto.

Second party agrees to furnish a grader or scaler, at its own cost and expense. Said grader or scaler shall inspect and grade all lumber covered by this contract and, in so doing, shall be strictly governed by the specifications and cutting instructions furnished from time to time by second party, and all grading shall be done in full accordance with rules for the grading of Idaho White Pine Lumber, as reported by the Bureau of Grades and adopted by the Western Pine Manufacturers Association. It is further agreed that the scale and accounts rendered by such grader or scaler shall be final and binding upon each of the parties to this contract and that the point at which inspection shall be made shall be the

point of delivery at Elk River, Idaho, unless otherwise agreed upon.

First parties further agree to remove from the lumber yard of the party of the second part, at their own cost and expense, and within a reasonable time, not exceeding seven days from date of rejection by grader, all lumber which is not up to grade or in accordance with the specifications as herein specified and is, therefore, rejected by the second party. Rejection shall be deemed automatically made by second party at time of grading.

The First Parties further agree that they will, at their own cost and expense, in accordance with the laws of the state of Idaho, arrange for and procure Workmen's Compensation and provide a suitable hospital contract for all employees, contractors, [10] subcontractors and piece workers in any manner engaged in carrying out this contract, and at all times during the continuance of this contract will maintain such Workmen's Compensation and hospital contract in good standing.

It is further understood and agreed by and between the parties hereto, that the sum of Five Dollars (\$5.00) per thousand board feet represents the loss to second party contemplated by the parties hereto by reason of its failure to receive the amount of lumber short of the full amount which first parties have agreed to cut, manufacture and deliver hereunder, and that if first parties fail, neglect or refuse to cut and manufacture into lumber all of the merchantable White Pine timber upon the lands referred to herein as being now owned by first par-

ties and which may be acquired by first parties during the life of this contract, (except such timber as may have been destroyed by fire) and to deliver the same to second party as herein provided, the first parties shall and do hereby agree to pay to second party the sum of Five Dollars (\$5.00) per thousand feet, board measure, for every thousand feet they shall fail, neglect or refuse to so cut, manufacture and deliver to second party, as well as and in addition to the cost of determining the amount of the shortage of lumber which they have failed, neglected or refused to so cut, manufacture and deliver to second party. It is further understood and agreed by and between the parties hereto that second party shall have and is hereby given a prior lien upon all of the real property hereinbefore referred to, and to the timber thereon and/or which may be cut therefrom, as security for the performance by first parties of each and all of the terms and conditions of this contract.

And it is further understood and agreed by and between the parties hereto that if second party shall fail, neglect or refuse to accept from first parties White Pine Lumber cut, manufactured and delivered by them to it in accordance with the terms hereof, and which meets and fulfills the conditions and specifications for lumber provided for herein, second party shall pay to first [11] parties the sum of Five Dollars (\$5.00) per thousand board feet for all such lumber so delivered to, but not accepted and paid for by second party. Such payment of Five Dollars (\$5.00) per thousand board

feet shall be in addition to the agreed purchase price for lumber which shall have been cut, manufactured and delivered by first parties from the land and timber covered by this contract.

All of the covenants, agreements and conditions of this contract shall inure to the benefit of and be binding upon the heirs, executors, administrators, successors and assigns of the respective parties hereto.

IN WITNESS WHEREOF the parties of the first part hereunto have set their hands and the said Potlatch Lumber Company has caused this instrument to be executed in its corporate name and its corporate seal to be hereunto affixed the day and year in this instrument first above written.

J. M. DUNGAN,  
EUNICE E. DUNGAN,  
Parties of the First Part.

Witnesses as to first parties:

A. H. GAWINS, Jr.  
POTLATCH LUMBER COMPANY,  
By W. D. HUMISTON.  
As Its Assistant General Manager,  
Party of the Second Part.

Witnesses as to second party:

J. E. GARDNER.  
LOIS M. NEWMAN. [12]

State of Washington,  
County of Spokane,—ss.

On this 19th day of February, 1926, before me, Milton Nussbaum, a notary public in and for said County and State, personally appeared J. M. Dungan and Eunice E. Dungan, his wife, known to me to be the persons whose names are subscribed to the within and foregoing instrument, and acknowledged to me that they executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and official seal the date last above written.

MILTON NUSSBAUM. [13]

State of Idaho,  
County of Latah,—ss.

On this 3d day of February, in the year 1926, before me, J. E. Gardner, a notary public in and for said State, personally appeared W. D. Humiston, known to me to be the assistant general manager of Potlatch Lumber Company, the corporation that executed the within and foregoing instrument, and acknowledged to me that such corporation executed the same and that he subscribed his name to said instrument as the assistant general manager of said corporation and affixed the seal thereof in attestation, and on oath stated that the seal affixed to said instrument is the corporate seal of said corporation and that all of said acts were done under powers granted by the by-laws of said corporation and in pursuance of directions given by the stockholders and board of directors of said corporation.

IN WITNESS WHEREOF I have hereunto set my hand and seal the day and year in this certificate first above written.

J. E. GARDNER,

Notary Public in and for the State of Idaho, Residing at Potlatch.

(My commission expires Oct. 5, 1928.) [14]

SPECIFICATIONS ATTACHED TO AND MADE A PART OF CONTRACT BETWEEN J. M. DUNGAN AND POTLATCH LUMBER COMPANY.

DATED NOVEMBER 28th, 1925.

LOGS AND LOGGING.

All logs shall be cut to such lengths as to provide from three (3) to four (4) inches extra length which will permit trimming the ends of the boards produced therefrom at true right angles to the edges of such boards.

All logs of "Select" and/or "Shop" type and quality shall be cut sixteen (16) feet long.

Of the *total* scale of all logs produced, at least seventy-five per cent (75%) shall be cut sixteen (16) feet long.

No logs shall be cut less than ten (10) feet long, and under no circumstances shall the total scale of all logs produced be represented by more than two (2) per cent of such ten (10) foot logs.

Trees with punk defects shall be so cut that the punk defect will, in so far as possible, come at the

ends of the logs. By so cutting the logs, the punk defects can be trimmed off the boards produced, resulting in higher lumber grades and reduction in waste. If possible, without sacrificing too much timber, the punk defect should be cut off the logs in the woods.

### SAWING LUMBER.

All lumber cut and delivered under the within contract shall be so sawed as to be uniform in thickness throughout the entire length and width of each piece and such thicknesses shall be those hereinafter specified. In sawing said lumber, the taper levers on the log carriage shall be used and the logs shall be turned on the carriage, whenever so doing will result in producing lumber of a better grade and/or quality than would otherwise be produced. [15]

Cutting up logs "alive" shall not be permitted under any circumstances. In sawing the lumber covered by this contract, all logs shall be so handled and all operations so conducted as to produce the highest possible grade of each piece of lumber consistent with reasonable utilization and economy of the logs.

### LUMBER THICKNESSES.

The following thicknesses shall govern in the sawing of all lumber cut and delivered under the within contract, and such thicknesses shall apply to the green lumber so delivered:

1" lumber shall be cut  $31/32$ " thick.

$5/4$ " lumber shall be cut  $1-3/8$ " thick.



6/4" lumber shall be cut 1-5/8" thick.

8/4" lumber shall be cut 2-1/8" thick.

### PERCENTAGES OF THICKNESSES OF LUMBER.

Of the total scale of all lumber cut and delivered under the within contract, the following percentages of various thicknesses shall govern until and unless other written instructions are given to the contrary by Potlatch Lumber Company through or by its General Manager or Assistant General Manager:

75% 8/4", that is 2-1/8" thick.

15% 5/4", that is 1-3/8" thick.

10% 1", that is 31/32" thick.

### TRIMMING LUMBER.

All lumber cut and delivered under the within contract shall be carefully and accurately trimmed in such way as to make the ends form true right angles with the sides. In trimming, all lumber shall be cut one (1) inch longer than the nominal lengths of the pieces. All trimming shall be so done as to produce the highest possible grades consistent with reasonable utilization of the lumber. No lumber less than eight (8) feet long will be accepted by Potlatch Lumber Company.

### EDGING LUMBER.

All lumber cut and delivered under the within contract shall be carefully and accurately edged in such a way that the edges [16] shall be truly parallel. All edging shall be so done as to produce the

highest possible grades consistent with reasonable utilization of the lumber. All lumber shall be edged to the following widths, green:

- 4" Edged to at least 4" full.
- 6" Edged to at least 6" full.
- 8" Edged to at least 8-1/8" full.
- 10" Edged to at least 10 1/4" full.
- 12" Edged to at least 12-3/8" full.
- 13" and wider edged to at least 1/2" over full nominal widths.

All lumber which is narrower than above shall be scaled as the next narrower width; provided, that all lumber narrower than full 4" throughout its entire length shall be rejected by Potlatch Lumber Company.

All lumber, except #3 Common, shall be square edged and free from wane on both sides and throughout the entire length of each and every piece.

POTLATCH LUMBER COMPANY.

By W. D. HUMISTON,  
Assistant General Manager.

Potlatch, Idaho, November 28th, 1925.

Filed in the U. S. District Court, Eastern Dist. of Washington. Jan. 3, 1929. Eva M. Hardin, Clerk. E. L. Colby, Deputy. [17]

In the District Court of the United States for the Eastern District of Washington, Northern Division.

No. L.—4493.

J. M. DUNGAN and EUNICE DUNGAN, His  
Wife,

Plaintiffs,

vs.

POTLATCH LUMBER COMPANY, a Corporation,

Defendant.

ANSWER.

Now comes the Potlatch Lumber Company, a corporation, defendant in the above-entitled action, and for its answer to the complaint of plaintiffs on file herein says:

I.

Admits the allegations contained in Paragraphs I, II and III of the complaint.

II.

Answering Paragraph IV of the complaint, defendant denies each and every allegation, averment, statement, matter and thing therein set forth or contained.

III.

Answering Paragraph V of the complaint, defendant denies each and every allegation, averment,

statement, matter and thing set forth or contained therein, except that defendant admits that a total amount of 6,857,307 feet of lumber was cut, manufactured and delivered to it from the timber designated in said contract.

#### IV.

Answering Paragraph VI of the complaint, defendant denies each and every allegation, averment, statement, matter and thing set forth or contained therein. [18]

For a further answer and by way of counterclaim, defendant alleges:

#### I.

That on or about the 28th day of November, A. D. 1925, plaintiffs and defendant entered into a contract in writing, a copy of which is attached to the complaint, marked Exhibit "A," and which is hereby referred to and made a part hereof as fully as though again repeated herein at length.

#### II.

That said contract was negotiated, made and entered into in the State of Idaho, and only the formal execution thereof by plaintiffs took place outside said state. Said contract was to be performed wholly within the State of Idaho, and it was intended by the parties thereto that the performance thereof should be governed by the laws of said state. In so far as the plaintiffs performed said contract, the same was actually performed in the State of Idaho.

III.

That at the time said contract was entered into and at all times subsequent thereto, it was and now is the law of the State of Idaho that in the absence of express or implied agreement of the parties, acceptance of the goods by the buyer shall not discharge the seller from liability in damages or other legal remedy for breach of any promise or warranty in the contract to sell or the sale. But, if after acceptance of the goods the buyer fail to give notice to the seller of the breach of any promise or warranty within a reasonable time after the buyer knows, or ought to know, such breach, the seller shall not be liable therefor.

IV.

That said contract contained the following provisions (among others) to wit:

“Provided, that Grade No. 3 Common shall not exceed 25% of the total cut and delivery.”

[19]

“The total estimated amount of White Pine Lumber covered by this contract is Nine Million (9,000,000) feet, board measure, more or less.”

V.

That by the terms of said contract the plaintiffs expressly warranted that the total amount of lumber cut and delivered thereunder would not contain more than 25% of Grade No. 3 Common lumber and that at least 75% of the total amount of lumber cut

and delivered under said contract would be of a quality better than grade No. 3 Common lumber.

## VI.

That the total amount of lumber delivered to defendant by plaintiffs was 6,857,307 feet board measure; that the amount of grade No. 3 Common lumber delivered was 2,299,971 feet board measure; that the amount of grades better than grade No. 3 Common delivered was 4,557,336 feet board measure; that 25% of the total amount of lumber cut and delivered under the contract and the maximum amount of grade No. 3 Common that plaintiffs were entitled to deliver thereunder was 1,519,112 feet; that plaintiffs, in violation of the express warranty in said contract that grade No. 3 Common shall not exceed 25% of the total cut and delivery, delivered to defendant 780,851 feet board measure of grade No. 3 Common lumber in excess of 25% of the total amount of lumber delivered under said contract.

## VII.

That plaintiffs made deliveries of lumber under said contract between August, 1926, and August, 1928, and the last delivery thereunder was made on the 15th day of August, 1928; that the total amount of lumber delivered by plaintiffs to defendant under said contract was 2,142,693 feet board measure less than the total amount of lumber to be delivered thereunder as estimated in said contract, to wit: 9,000,000 feet; that defendant did not know that plaintiffs had breached the express warranty in said contract that [20] grade No. 3 Common shall not

exceed 25% of the total cut and delivery thereunder until after the last delivery of lumber was made, and after it had ascertained upon an investigation that all the timber covered by the contract had been cut. That defendant thereupon immediately and within a reasonable time after learning of such breach, to wit, on September 18, 1928, gave notice to the plaintiffs in writing that they had breached said express warranty by delivering an excess of grade No. 3 Common lumber in violation thereof; that thereafter, to wit, on October 13, 1928, and within a reasonable time after learning of such breach, the defendant again gave notice to the plaintiffs in writing of the breach of the express warranty in said contract that grade No. 3 Common shall not exceed 25% of the total cut and delivery and that it considered the excess of grade No. 3 Common delivered a breach of the contract.

#### VIII.

That grade No. 3 Common rough Idaho White Pine Lumber is an inferior grade of lumber and of much less value than the lumber specified in said contract; that during the period that deliveries of lumber were made under the contract, to wit, from August, 1926, to August, 1928, inclusive, the market value and actual value of the lumber specified in the contract at the place of delivery was the contract price, to wit: \$32.50 per thousand feet board measure; that during said period the market value and actual value of grade No. 3 Common rough Idaho White Pine lumber specified in the contract at the place of delivery was not in excess of \$13.38

per thousand feet board measure; that by reason of the breach of said express warranty in the contract and the delivery by plaintiffs to defendant of 780,859 feet board measure of grade No. 3 Common lumber in excess of 25% of the total amount of lumber cut and delivered under said contract, defendant was damaged in the sum of \$14,930.02, being the [21] difference between the market value and the actual value of the lumber delivered and the market value and the actual value of the lumber, if it had been delivered in accordance with the terms of the contract.

WHEREFORE, defendant prays that plaintiffs take nothing in this action; that defendant recover from plaintiffs on its counterclaim the sum of \$14,930.02; and that it recover its costs and disbursements herein expended.

WAKEFIELD & WITHERSPOON,

Residence and P. O. Address:

Spokane, Washington,

GRAY & POTTS,

Residence and P. O. Address:

Coeur d'Alene, Idaho,

Attorneys for Defendant. [22]

State of Washington,

County of Spokane,—ss.

A. W. Laird, being first duly sworn on oath, deposes and says:

That he is an officer, to wit, treasurer and general manager of the Potlatch Lumber Company, defendant in the above-entitled action; that he makes this



verification for and on behalf of said corporation and is authorized so to do; that he has read the within and foregoing answer and knows the contents thereof; and that he believes it to be true.

A. W. LAIRD.

Subscribed and sworn to before me this 16th day of April, A. D. 1929.

[Notarial Seal] HARRY T. DAVENPORT,  
Notary Public in and for the State of Washington,  
Residing at Spokane, Washington.

Due service of the within answer by receipt of a true copy thereof is hereby accepted at Spokane, this 16th day of April, 1929.

O. C. MOORE,  
Attorney for Plaintiffs.

Filed Apr. 17, 1929. [23]

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[Title of Court and Cause.]

ORDER ON DEMURRER TO AND MOTION TO  
STRIKE FROM AFFIRMATIVE ANSWER.

The above cause having heretofore come regularly on to be heard in open court on plaintiff's demurrer to the further answer and counterclaim set forth and alleged in the answer of the defendant to the complaint herein, the parties thereto appearing and being represented by their respective attorneys and the Court having read said demurrer and motion to strike and heard the arguments of counsel

thereon and being now fully advised in the premises, hereby

CONSIDERS, ORDERS AND ADJUDGES that said demurrer be and is hereby overruled, and that said motion to strike be and is hereby sustained, with respect to Paragraphs 2, 3 and 5 of said affirmative answer and counterclaim, and denied as to Paragraph 4 thereof.

Each of the parties is allowed an exception in so far as the above order is adverse to them respectively.

Done in open court this 29th day of October, A. D. 1929.

J. STANLEY WEBSTER,  
Judge.

Form approved.

GRAY & POTTS,  
WAKEFIELD & WITHERSPOON,  
For Deft.  
O. C. MOORE,  
For Pltfs.

Filed Oct. 29, 1929. [24]

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[Title of Court and Cause.]

REPLY.

Come now the plaintiffs and reply to the further answer and counterclaim set forth and alleged in defendant's answer to the complaint herein, as follows:

I.

Admit Paragraph I of said further answer and counterclaim.

II.

Admit Paragraph IV of said further answer and counterclaim.

III.

Deny Paragraph VI of said further answer and counterclaim and the matters and things set forth and alleged therein, save and except plaintiffs admit the total amount of lumber delivered by plaintiffs to defendant was 6,857,307 feet.

IV.

Deny Paragraph VII of said further answer and counterclaim and the matters and things set forth and alleged therein, save and except they admit that plaintiff made certain deliveries of lumber under said contract between August, 1926, and August, 1928. [25]

V.

Deny Paragraph VIII of said further answer and counterclaim and the matters and things set forth and alleged therein, and deny that defendant was or has been damaged in the sum of \$14,930.02, or any other sum or amount whatever.

VI.

Paragraphs II, III and V of said further answer and counterclaim have not been heretofore referred to herein for the reason that same have been stricken by order of this Court.

WHEREFORE, plaintiffs pray that defendant take nothing by its said answer and counterclaim and that plaintiffs have and recover judgment as prayed in their complaint herein.

O. C. MOORE,  
Attorney for Plaintiffs.

State of Washington,  
County of Spokane,—ss.

J. M. Dungan, being first duly sworn, on oath deposes and says that he is one of the plaintiffs in the above-entitled action, that he has read the foregoing and attached reply, knows the contents thereof, and that same is true as he verily believes.

J. M. DUNGAN.

Subscribed and sworn to before me this 28th day of November, 1929.

[Notarial Seal] O. C. MOORE,  
Notary Public, in and for the State of Washington,  
Residing at Spokane.

Copy received this 29th day of November, 1929.

WAKEFIELD & WITHERSPOON,  
Attorneys for Defts.

Filed Nov. 30, 1929. [26]

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[Title of Court and Cause.]

#### AMENDMENTS TO ANSWER.

1. Amend Paragraph Three on page 1 of the answer by changing the period after the word "con-

tract" at the end of said paragraph, and in the fifth line thereof, to a comma and inserting the following:

"And that 4,687,063 feet of said lumber was delivered to defendant during the years 1926 and 1927 and the defendant has fully paid therefor as stipulated in said contract, save and except that of the stipulated purchase price, namely, \$32.50 per thousand feet, defendant, pursuant to the terms and conditions of said contract, withheld the sum of \$1.00 per thousand feet as a guaranty for performance by plaintiffs of the requirements of the laws of the state of Idaho for the burning of brush on the lands from which said timber was cut and removed."

2. Amend Paragraph Four on page 1 of the answer, by changing the period after the word "therein" at the end of said paragraph, and in the third line thereof, to a comma and inserting the following:

"Except that defendant admits that it has paid the sum of \$57,149.28 to plaintiffs and the sum of \$2,762.50 to laborers for burning of brush on the lands described in said contract, totaling \$59,911.78 for lumber delivered by plaintiffs to defendant between the dates therein mentioned."

Copy of the within and foregoing amendments to answer received this 12th day of March, 1930.

O. C. MOORE,  
Attorney for Plaintiffs.

Filed March 17, 1930. [27]

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[Title of Court and Cause.]

STIPULATION WAIVING JURY.

IT IS HEREBY STIPULATED between the parties to the above-entitled cause, by and through their respective attorneys, that said cause may be tried and determined by the Court without the intervention of a jury, and it is further hereby stipulated that a jury trial of said cause be and hereby is expressly waived.

Dated this 17th day of March, A. D. 1930.

O. C. MOORE and  
BRUCE BLAKE,  
Attorneys for Plaintiffs.

WAKEFIELD & WITHERSPOON and  
GRAY & POTTS,  
Attorneys for Defendant.

Filed March 17, 1930. [28]

[Title of Court and Cause.]

PLAINTIFF'S REQUEST FOR FINDINGS  
OF FACT.

Come now the plaintiffs and hereby request the Court to make and enter the findings of fact No. I and II proposed by and on its behalf, and filed herewith.

O. C. MOORE and  
BRUCE BLAKE,  
Attorneys for Plaintiff.

Filed Mar. 18, 1930. [29]

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[Title of Court and Cause.]

FINDINGS PROPOSED BY PLAINTIFF.

The above-entitled cause having come on regularly for trial to the Court, without a jury, on the 17th day of March, A. D. 1930, Messrs. O. C. Moore and Bruce Blake appearing for plaintiffs and Messrs. Wakefield & Witherspoon and Gray & Potts appearing for defendant, and evidence having been introduced on behalf of the respective parties, and the Court having heard and considered the arguments of counsel thereon and being now fully advised in the premises, hereby finds:

I.

That with respect to all lumber received and

accepted by defendant, it waived any objection as to the grade thereof and is estopped from contending that any portion thereof in excess of the provisions of the contract was No. 3 Common lumber.

## II.

That by virtue of said waiver defendant is precluded from recovering any amount on its counterclaim or offsetting any portion or part thereof against the demands of plaintiffs.

Refused.—J. STANLEY WEBSTER, Judge.

Done in open court this —— day of March, A. D. 1930.

\_\_\_\_\_,  
Judge.

Plaintiff excepts in open court to the refusal of the Court to make the above findings numbered I and II, proposed by the plaintiffs, and said exceptions are allowed.

Done in open court this 18th day of March, A. D. 1930.

J. STANLEY WEBSTER,  
Judge.

Filed Mar. 18, 1930. [30]

\_\_\_\_\_  
[Title of Court and Cause.]

## SPECIAL FINDINGS OF FACT.

This cause came on regularly for trial before the Court sitting without a jury on the 17th day of



March, A. D. 1930, a trial by jury having been expressly waived by the parties in open court and by stipulation in writing filed in the cause, the plaintiffs appearing in person and being represented by their attorneys, Messrs. O. C. Moore and Bruce Blake, and the defendant being represented by its attorneys, Messrs. Wakefield and Witherspoon and Gray & Potts, and evidence, oral and documentary, having been adduced, and the Court having heard the argument of counsel, and being now fully advised in the premises, hereby makes the following

SPECIAL FINDINGS OF FACT

to wit:

I.

That the total amount of lumber delivered by plaintiffs to defendant under the contract alleged in the complaint and admitted by the answer was 6,857,307 feet board measure, Grade No. 3 common or better Rough Idaho White Pine Lumber.

II.

That, of the total amount of lumber so delivered by plaintiffs to defendant, 4,557,336 feet board measure was grade No. 3 Common Rough Idaho White Pine Lumber. [31]

III.

That, of the total amount of lumber so delivered by plaintiffs to defendant, 4,557,336 feet board measure was of grades better than grade No. 3 Common Lumber.

IV.

That twenty-five per cent of the total amount of

lumber cut and delivered by plaintiffs to defendant was 1,519,112 feet board measure.

#### V.

That plaintiffs delivered to defendant, and defendant received, 780,851 feet board measure of grade No. 3 Common Rough Idaho White Pine Lumber in excess of twenty-five per cent of the total amount of lumber cut and delivered.

#### VI.

That the excess of 780,851 feet of grade No. 3 Common Lumber was delivered as follows:

In the year 1926, 149,293 feet;

In the year 1927, 321,723 feet;

In the year 1928, 309,843 feet.

#### VII.

That the market value of the excess of grade No. 3 Common Lumber at the place of delivery was as follows:

In the year 1926 the sum of \$15.50 per thousand feet board measure;

In the year 1927 the sum of \$14.50 per thousand feet board measure;

In the year 1928 the sum of \$13.50 per thousand feet board measure.

#### VIII.

That the difference between the market value of the excess of grade No. 3 Common Lumber delivered and the contract price is the sum of Fourteen

Thousand Two Hundred Sixteen and 02/100 (\$14,216.02) Dollars.

IX.

That the defendant is entitled to set off against the [32] demand of the plaintiffs the said sum of Fourteen Thousand Two Hundred Sixteen and 02/100 (\$14,216.02) Dollars under its counter-claim.

Done in open court this 18th day of March, A. D. 1930.

J. STANLEY WEBSTER,  
Judge.

To each and every of the foregoing special findings from two to nine, inclusive, the plaintiffs entered their exceptions and said exceptions allowed this 18th day of March, 1930.

J. STANLEY WEBSTER,  
Judge.

Filed March 18, 1930. [33]

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In the District Court of the United States for the Eastern District of Washington, Northern Division.

No. L.—4493.

J. M. DUNGAN and EUNICE DUNGAN, His  
Wife,

Plaintiffs,

vs.

POTLATCH LUMBER COMPANY, a Corpora-  
tion,

Defendant.

**JUDGMENT.**

This cause came on regularly for trial before the Court sitting without a jury on the 17th day of March, A. D. 1930, a trial by jury having been expressly waived by the parties in open court and by a stipulation in writing filed in the cause, the plaintiffs appearing in person and being represented by their attorneys, Messrs. O. C. Moore and Bruce Blake, and the defendant being represented by its attorneys, Messrs. Wakefield & Witherspoon and Gray & Potts, and evidence, oral and documentary, having been adduced, and the Court having heard the argument of counsel, and the cause having been submitted for decision, and the Court having made and filed herein special findings of fact, and being now fully advised in the premises, hereby **CONSIDERS, ORDERS AND ADJUDGES:**

1. That plaintiffs are entitled to recover from the defendant on the cause of action stated in their complaint the sum of Fifteen Thousand Three Hundred Eight and 21/100 (\$15,308.21) Dollars.

2. That defendant is entitled to recover from the plaintiffs on its counterclaim the sum of Fourteen Thousand Two Hundred Sixteen and 02/100 (\$14,216.02) Dollars, and that defendant is entitled to have said amount set off against the demand of plaintiffs.

3. That plaintiffs are entitled to recover judgment against the defendant for the sum of One Thousand Ninety-two and [34] 19/100 (\$1,092.19) Dollars, with interest thereon at the rate of Six

(6%) per cent per annum from the 12th day of August, 1928, amounting to One Hundred Four and 66/100 (\$104.66) Dollars, aggregating the sum of One Thousand One Hundred Ninety-six and 85/100 (\$1,196.85) Dollars, and their costs and disbursements herein expended, with interest on the judgment at the rate of six (6%) per cent per annum from the date hereof.

WHEREFORE, by reason of the law and the findings aforesaid, IT IS HEREBY ORDERED, ADJUDGED AND DECREED,—

That the plaintiffs, J. M. Dungan and Eunice Dungan, his wife, do have and recover of and from the defendant, Potlatch Lumber Company, a corporation, the sum of One Thousand Ninety-two and 19/100 (\$1,092.19) Dollars, with interest thereon at the rate of six (6%) per cent per annum from the 12th day of August, 1928, amounting to One Hundred Four and 66/100 (\$104.66) Dollars, aggregating the sum of One Thousand One Hundred Ninety-six and 85/100 (\$1,196.85) Dollars, and their costs and disbursements herein expended, taxed at the sum of Ninety-seven and 80/100 Dollars, with interest on the whole amount thereof at the rate of six (6%) per cent per annum from the date hereof.

Done in open court this 18th day of March, A. D. 1930.

J. STANLEY WEBSTER,  
Judge.

The plaintiffs entered their exceptions to findings numbers two and three in the foregoing judgment

and said exception allowed this 18th day of March, 1930.

J. STANLEY WEBSTER,

Judge.

Filed March 18, 1930. [35]

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[Title of Court and Cause.]

### ORDER EXTENDING TERM.

Upon application of plaintiffs,—

IT IS HEREBY ORDERED that the term at which judgment was entered in this action be and the same is hereby extended for a period of 60 days for the purpose of retaining jurisdiction of the above-entitled cause to file, present and settle bill of exceptions, and to file, hear and determine any and all motions that might have been filed, heard or determined during the term in which the judgment herein was entered.

Done in open court this 20th day of March, 1930.

J. STANLEY WEBSTER,

Judge.

Filed Mar. 20, 1930. [36]

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[Title of Court and Cause.]

### BILL OF EXCEPTIONS.

BE IT REMEMBERED that this cause came on for trial on the 17th day of March, 1930, before the above-entitled court, the plaintiffs appearing in

person and by their attorneys, O. C. Moore and Bruce Blake, and the defendant appearing by its attorneys, Gray & Potts and Wakefield & Wither-  
spoon, whereupon, by reason of a written stipulation entered into waiving a trial by jury and consenting that the case be tried by the Hon. J. Stanley Webster, Judge of the above-entitled court, without a jury, the cause was tried without a jury and the following proceedings were had:

Upon the calling of the case Mr. Potts moved for leave to amend the answer in two particulars as follows:

First, to amend Paragraph 3 by changing the period after the word "contract" at the end of said paragraph and by inserting the following:

"And that 4,687,063 feet of said lumber was delivered to defendant during the years 1926 and 1927, and the defendant has fully paid therefor, as stipulated in said contract, save and except that of the stipulated price, namely, \$32.50 per thousand feet, defendant pursuant to the terms and conditions of said contract withheld the sum of One Dollar per thousand feet as a guaranty for performance by plaintiffs of the requirements of the laws of the State of Idaho for the burning of brush on the lands from which said timber was cut and removed."

Second, to amend Paragraph 4 by changing the period [37] after the word "therein" at the end of said paragraph to a comma and by inserting the following:

“Except that defendant admits that it has paid the sum of \$57,149.28 to plaintiffs and the sum of \$2,762.50 to laborers for burning of brush on the lands described in said contract, totalling \$59,911.79, for lumber delivered by said plaintiffs to defendant between the dates therein mentioned.”

No objection being interposed, the Court allowed the amendments to be filed.

This is an action to recover \$15,308.21, balance alleged to be due upon a logging and milling contract against which the defendant by affirmative defense and set-off pleaded that it had suffered damage in the sum of \$14,930.02 by reason of the delivery of lumber of #3 grade in excess of 25% of the total amount of lumber delivered under the contract.

BE IT FURTHER REMEMBERED that during the trial of said cause the following testimony was introduced bearing upon the issues raised by the pleadings and submitted to the Court.

The first witness being introduced was CLARENCE C. CHAMBERS.

#### TESTIMONY OF CLARENCE C. CHAMBERS, FOR PLAINTIFFS.

##### Direct Examination.

(By Mr. MOORE.)

My name is Clarence C. Chambers. I was in charge of operations for plaintiffs in the performance of the contract with Potlatch Lumber Com-



(Testimony of Clarence C. Chambers.)

pany. I am acquainted with the lands covered by the contract. The lands described in Plaintiffs' Exhibits Nos. 1, 2 and 3 comprise all the lands contemplated and covered by said contract. All the merchantable white pine timber on the lands contemplated and covered by the contract was cut and removed and manufactured into lumber and delivered to defendant.

Cross-examination.

(By Mr. POTTS.)

I was at all times in charge of the operations. I can't [38] say just what time the last lumber was delivered but some time in '28.

Plaintiffs' Exhibits Nos. 1, 2 and 3 were admitted in evidence. They are certificates of the firewarden of the district to the effect that the plaintiffs had complied with Chap. 150, Idaho Session Laws of 1925, by cleaning up and burning brush, etc.

The Clerk is requested to attach each and all of said exhibits hereto and by reference same are hereby made a part hereof.

The plaintiffs having rested, the defendant called E. H. HANSEN as a witness.

TESTIMONY OF E. H. HANSEN, FOR  
DEFENDANT.

Direct Examination.

(By Mr. POTTS.)

Mr. HANSEN testified that he was a lumber grader for the Potlatch Lumber Company. Dur-

(Testimony of E. H. Hansen.)

ing the progress of his testimony the following colloquy took place between the Court and the respective counsel:

Mr. MOORE.—May I interrupt for a moment. With the idea of abbreviating this trial and facilitating the examination, I have a suggestion to offer. If our objection to this line of testimony and the questions going to the grade of lumber and their contention of excess of No. 3 Common over 25% was accepted and received, if we could have a general objection to all this line of testimony and exception to your Honor's rulings overruling it, if that is permissible—

The COURT.—I have no objection. I have ruled on the point making up the pleadings in the case and am adhering to the ruling in the hearing of the evidence.

Mr. MOORE.—I was hoping, your Honor, to have an opportunity to present it more fully before the case was all. I want to make a record.

\* \* \* \* \*

Mr. MOORE.— Just one other interruption, if your Honor please. [39] Subject to the objection which we have made and which we still urge, plaintiff is willing to stipulate and concede, subject to an exception, that defendant has witnesses and will be able to introduce testimony, tending to establish, pursuant to the allegations of their answer, that there was an excess above 25% of No. 3 Common lumber delivered in accordance with the allegations of their answer. We are not conceding that,

but we concede that they have evidence that will tend to prove that and that we have no evidence, the plaintiffs have no evidence at all on the question.

The COURT.—Does that shorten our hearing?

Mr. POTTS.—It will shorten it materially. The very nature of it will require a great degree of proof.

The COURT.—Yes.

Mr. POTTS.—But, I think the fact as alleged in the answer, that there was a certain amount of No. 3 Common would have to be admitted.

The COURT.—In order to furnish a basis for calculations?

Mr. POTTS.—Yes.

Mr. MOORE.—I intended, your Honor, my suggestion should also include that, they will be able to establish by their witnesses, that the witnesses will testify in a manner to establish that, both as to the grades and the amounts, and we have no testimony to combat it.

Mr. POTTS.—The answer alleges that there was delivered 2,299,971 feet of No. 3 Common under the contract; that there was delivered 4,557,336 feet of better grades; that the total amount delivered was 6,857,307 feet, which is admitted, and that the excess of No. 3 Common over and above 25% of the total cut and delivery was 780,851 feet.

Now, if counsel for plaintiffs will admit that that is the fact, it will dispense with all this proof.

Mr. BLAKE.—If your Honor please, we object to this evidence as being incompetent, irrelevant and

immaterial, on the ground that they have accepted all of the lumber and have waived all of their right to make any complaint that there was in excess of 25% of No. 3.

The COURT.—I understand that.

Mr. BLAKE.—With the record made clear upon that objection; [40] that that objection is overruled and exception taken; then we are willing to admit that their witnesses will testify to facts, or testify to the facts as stated by Mr. Potts, and that we have no controverting testimony on those facts.

The COURT.—Well, of course, if they have testimony tending to prove those facts and there is no evidence offered to rebut it, the Court would have to find as a matter of law that those facts are established, and the only question that would remain is the question of law as to whether or not you are entitled under this contract to offset that because of having accepted the lumber.

Mr. BLAKE.—All we are trying to do is to save our point.

The COURT.—I see. Oh, yes.

Mr. BLAKE.—We are not making an admission here that waives our point.

The COURT.—Oh, no, of course not.

Mr. BLAKE.—It will dispense with offering detailed proof of this.

The COURT.—I understand. The record can show that the Court understands that the plaintiffs in making the concession just stated by Judge Blake reserve all of their rights as to competency, rele-

(Testimony of A. W. Laird.)

vancy and materiality of that testimony, and that the concession is made merely for the purpose of expediting the trial and avoiding the necessity on the part of the defendant of offering this detailed proof in support of the allegations involved. That covers it, doesn't it?

Mr. POTTS.—I think so, your Honor.

The COURT.—Now, I assume, if my memory of this case is accurate, that that leaves a question of law, that with those facts established there is nothing to do but to make a calculation.

Mr. POTTS.—No, your Honor. I wish that were the case but I think we are still confronted with the necessity of proving the value of the No. 3 Common.

[41]

## TESTIMONY OF A. W. LAIRD, FOR DEFENDANT.

### Direct Examination.

(By Mr. POTTS.)

My name is A. W. Laird and I reside at Potlatch, Idaho. I am manager of the Potlatch Lumber Company and have been since 1913.

Mr. POTTS.—Q. Mr. Laird, what is the value, the fair reasonable value of No. 3 Common and Rough Idaho White Pine Lumber at the Elk River mill of the Potlatch Lumber Company during the years 1926, '27 and '28?

Mr. MOORE.—Now, your Honor, we object at this point to that question as irrelevant, incompetent,

(Testimony of A. W. Laird.)

and immaterial, not within the issues, and that this question is not at issue and the defendants are not in position to raise it, having accepted this lumber under the contract.

The COURT.—That objection will be overruled.

Mr. MOORE.—Exception.

The COURT.—Exception allowed.

Mr. POTTS.—Do you desire now to make the admission?

The COURT.—Mr. Laird has not testified yet.

A. You mean price for the green lumbered delivered at the mill?

Mr. POTTS.—Yes, as this lumber under the Dungan contract was delivered at Elk River.

The COURT.—Confining yourself, Mr. Laird, to the No. 3 Common.

Mr. POTTS.—Yes, to No. 3 Common.

A. From 13 and one-half to \$15, or \$15.50. There was a little variation between the three years.

Q. Now, just apply that to the years, please. Take 1926.

A. I would say in 1926 fifteen dollars and a half; in 1927 fourteen dollars and a half; in 1928 thirteen dollars and a half.

The defendant having rested and the Court having granted plaintiffs leave to reopen their case, J. M. DUNGAN was called. [42]

TESTIMONY OF J. M. DUNGAN, FOR PLAINTIFFS.

Direct Examination.

(By Mr. MOORE.)

I am one of the plaintiffs. I am seventy-one years old. I have been a wheat farmer all by life and never had any experience in the lumber business until I entered into this contract. The contract, a copy of which is attached to the complaint, was prepared by the Potlatch Lumber Company and I signed it without any modifications.

Cross-examination.

(By Mr. POTTS.)

Q. Mr. Clarence C. Chambers negotiated this contract of the Potlatch Lumber Company, did he?

A. No.

Mr. MOORE.—That is not the question. Objected to an improper cross-examination.

The COURT.—Overruled. I do not see any place in the case for any testimony at all, but I will overrule objection.

Mr. MOORE.—Exception.

Mr. POTTS.—Q. Mr. Chambers is a lumberman of years of experience, isn't he.

A. I could not say.

Q. You knew he was, you put him in charge of this operation, he handled this operation for you?

A. He did.

Having heard the argument of counsel the Court rendered the following opinion from the bench:

The COURT.—Well, Gentlemen, I find myself in the same frame of mind. I have given thought to this contract, and I cannot see it in the light of plaintiffs' counsel. I could not at the time it was argued on the pleadings; I cannot now. If there is trouble about this contract, all the trial court can do is to express its views concerning it.

This contract contemplated the cutting and delivery of an indefinite amount of timber. It dealt not only with lands which the [43] plaintiffs owned, it contemplated lands which were to be acquired, and consequently the scope of the area to be logged and cut into lumber was indefinite and uncertain. Lumber from the area that subsequently was cut, and which under the contract it was agreed should be delivered to the defendant company, was to be purchased by it on a lump price basis of \$32.50 for all grades as good as No. 3 Common.

Now, at the time this lumber was delivered, as long as the lumber measured up to the grade of No. 3 Common, the lumber company had no discretion to reject it. It met the requirement of the contract. It was to be that good, and if it had been that good, there was no right on the part of the company to reject it.

The contract contemplates and expressly provides that the plaintiffs shall deliver to the company all the lumber that it cuts off the lands in question, and it provides a protection against this lump sum price



of \$32.50 that there must not be in excess of twenty-five per cent of No. 3 Common.

How you can determine what twenty-five per cent of a volume of lumber is without knowing what that volume of lumber is, is beyond my comprehension. How you can determine that the common under this contract exceeded twenty-five per cent of the whole, without knowing what the whole was, is beyond my knowledge of mathematics. It seems to me that in the very nature of things, and as inhering in the contract itself, it necessarily contemplates that the contract would have to be performed before anybody would know whether or not the amount of common lumber delivered under it, No. 3 delivered under it, was in excess of twenty-five per cent of the whole, and the contract contemplates the delivery by the plaintiff to the defendant of all the lumbers cut upon the lands in question, and the contract does not provide in its terms what is the value of that No. 3 Common which is found to be in excess of twenty-five per cent, and the law applies. It is not writing a new provision into a contract; it is applying the law of the land to the provisions of the contract as written, and where it clearly provides [44] that as a security for the agreement to pay a lump sum price for all grades above No. 3 Common that the No. 3 Common must not exceed twenty-five per cent of the total lumber delivered, and it does, when the contract is computed, exceed that amount, it leaves plaintiffs in a situation where they have delivered to the defendant a quantity of lumber not covered by the contract as to the \$32.50

price, but which the lumber company has accepted and received, and according to my notion of the elementary rules of law applicable in such situations, the defendant is compelled to answer for it at the market price of the lumber at the time and place of its delivery.

The *legan* conclusion, as it appears to me, is fortified by the fact that it comports with the equities and the common honesty of the transaction. The plaintiffs have no right to saddle upon the defendant a quantity of lumber at \$32.50 which, according to the market at the time, was not to exceed half that value, in the face of a provision in the contract which expressly provides that the No. 3 Common shall not exceed a quarter of the entire lumber sold and delivered. If the plaintiffs receive *pro* the lumber that they sold and delivered every dollar that they are entitled to for the seventy-five per cent of the lumber sold, at \$32.50, and receive the market value of the excess of the No. 3 Common additional, at the time and place it was received by the lumber company, they receive everything that in equity and good conscience they are entitled to, so the equities of the case are in conformity with what I consider to be the law of the case, and the judgment will be accordingly.

If counsel will get together and take these admitted facts and figure the excess of No. 3 Common, the admitted amount, at the prices stipulated 1926, \$15.50; 1927, \$14.59; and 1928, \$13.50; and present a judgment reflecting that calculation, I will sign it.

It seems to me that so far as the question of the

excess of this No. 3 Common is concerned, the contract is silent upon it. The provision with respect to rejecting cannot possibly be applied to [45] it, because as long as it was No. 3 Common, the company had no right to reject it. If they had laid it aside and said, "Here, Dungan, haul it off," why he would have said, "Why, no. How are you going to determine in advance that this is going to exceed twenty-five per cent of my contract? I have got lumber of better grades yet to come in, that will cut down his ratio. This lumber that I am delivering is No. 3 Common. The contract provides that you shall take it. The only provision in the contract is that there must not be more than twenty-five per cent of this amount. You have no right to prejudge what my contract is going to develop. If I come in here later with lumber enough of the higher grades to offset this amount of common, what right have you got now to reject this common lumber?" And what would your answer have been to that?

It seems to me that there could be no rejection of it as long as it measured up to the stipulations of the contract, and that if on fulfillment it was found that there was an excess amount of No. 3 Common, that the contract with respect to that excess amount is silent, and the law takes charge in a situation of that sort, of an aspect of the transaction between the parties not covered by their agreement, and the law is that the defendant having received and accepted it, must pay for it at the fair market value of it at the time and place of its delivery.

I think you will have no trouble with what I have said to make your calculations, will you, Mr. Potts? The figures are all admitted.

Thereupon the following occurred:

Mr. POTTS.—One difficulty will be applying the values of 1926 and '27 to the admitted figures, the admission being that there is a certain amount delivered during those two years, rather than separately.

The COURT.—You mean there is no date before you on which to determine the amount delivered in each year?

Mr. POTTS.—No, there is not. [46]

The COURT.—Do you desire to offer proof so segregating it?

Mr. POTTS.—Yes, your Honor. I think we should ask permission to reopen our case.

The COURT.—In view of this variation in price from \$13.50 to \$15.00, there ought to be something here to segregate the amounts of the delivery during those several years.

Mr. POTTS.—Yes, there should be, and also upon the price each year.

The COURT.—I see that. I will allow you to show what amount was delivered of the No. 3 Common in excess of twenty-five per cent during the years 1926, 1927 and 1928, applying the market price as I have stated, as given by Mr. Laird.

DEFENDANT'S CASE RESUMED.

TESTIMONY OF W. L. MAXWELL, FOR DEFENDANT.

W. L. MAXWELL, called as a witness by the defendant, being first duly sworn, testified in its behalf as follows:

Direct Examination.

(By Mr. POTTS.)

Q. State your name, Mr. Maxwell, residence and occupation.

A. W. L. Maxwell, Potlatch, Idaho. Auditor of the Potlatch Lumber Company.

Q. Mr. Maxwell, have you computed from the books of the Potlatch Lumber Company the amount of the No. 3 Common for each of the years 1926, 1927 and 1928?     A. I have.

The COURT.—Delivered under the Dungan contract?

The WITNESS.—I have.

Mr. POTTS.—Q. And have you that computation with you?

A. Yes, sir.

Q. Will you state the amount of the No. 3, the excess of No. 3. [47]

A. I would have to make that computation, Mr. Potts.

Q. All right. You have the amount of No. 3 that was delivered each year?

(Testimony of W. L. Maxwell.)

A. I have the amount of No. 2 and better, and the amount of No. 3.

The COURT.—Can you do that if we give you a little time now?

The WITNESS.—Yes, sir.

The COURT.—We will take a few minutes recess and allow Mr. Maxwell to make that computation, and when he has it ready, he can call me. We will take a recess.

(At this time a short recess was taken.)

Mr. POTTS.—Q. Mr. Maxwell, have you computed the proportion of the excess of No. 3 Common delivered in each of the years 1926, '27 and '28?

A. I have.

Q. Give it, please. How much in 1926?

A. 149,293 feet.

Q. In 1927? A. 321,723 feet.

Q. And in 1928? A. 309,843 feet.

The COURT.—Now, we have the full data for the calculation, haven't we?

Mr. POTTS.—I think so. Yes, I think that is all.

Cross-examination.

(By Mr. MOORE.)

Q. Do those totals, may I inquire, total up the full amount as you allege, you have stated?

A. Yes, sir.

The COURT.—Have you proved that?

The WITNESS.—Yes, sir.

(Testimony of W. L. Maxwell.)

The COURT.—And it makes the total amount?  
[48]

The WITNESS.—It makes the total amount; yes, sir.

On March 18, 1930, the Court entered judgment and made general and special findings to certain of which plaintiffs duly excepted; and the Court refused to make findings proposed by plaintiffs to which refusal plaintiffs duly excepted.

And now the plaintiffs present the foregoing as their bill of exceptions and pray that the same may be settled, allowed, signed and certified as provided by law and the practice of this Honorable Court.

O. C. MOORE,  
BRUCE BLAKE,  
Attorneys for Plaintiffs.

Due service of the within bill of exceptions, by true copy thereof, is admitted at Spokane, Washington, this 26th day of March, A. D. 1930.

GRAY & POTTS,  
WAKEFIELD & WITHERSPOON,  
Attorneys for Defendant.

Lodged Mar. 26, 1930.

Filed Apr. 26, 1930. [49]

L.—4493.

## PLAINTIFF'S EXHIBIT No. 1.

Adm. E. M. H.

State of Idaho.

## CERTIFICATE OF CLEARANCE.

No. 65.

THIS CERTIFIES That I have personally inspected the disposal of slash incident to the logging and cedar operations of J. M. Dungan of Spokane, Washington, on the following described tracts or parcels of Forest Land in Idaho, to-wit, SE $\frac{1}{4}$ SE $\frac{1}{4}$ , Sec. 13, NE $\frac{1}{4}$ NE $\frac{1}{4}$ , Sec. 24, T. 39 N. R. 1 W., E $\frac{1}{2}$ -SW $\frac{1}{4}$ , W $\frac{1}{2}$ SE $\frac{1}{4}$ , Sec. 18, N $\frac{1}{2}$ , N $\frac{1}{2}$ S $\frac{1}{2}$ , Sec. 19, T. 39 N. R. 1, E. B. M.

Containing six hundred acres of slash, more or less.

This slash was made in the years of 1926, 1927 and 1928. The land is reputed to be owned by J. M. Dungan of Spokane, Washington.

THIS IS TO FURTHER CERTIFY That, as a result of such personal inspection, it is my opinion that the slash has been disposed of in accordance with the laws of the State of Idaho; with the rules and regulations of the State Cooperative Board of Forestry and with the written permit of the State Forester (if any) on — acres of above slashing area, described as follows:



IN WITNESS WHEREOF, I have hereunto affixed my signature this 17th day of October, 1928.

R. L. WOESNER,

Fire-Warden,

Potlatch Forest Protective District of the State of Idaho.

This CERTIFICATE OF CLEARANCE will be accepted by the State Cooperative Board of Forestry, or any Executive Committee thereof; by the State Forester and his Deputy; and by all Fire Wardens and their Deputies as *prima facie* evidence of the facts stated; Provided, however, that this Certificate of Clearance may be revoked, cancelled or disregarded by the State Cooperative Board of Forestry for any reason sufficient to said Board. [50]

# Township Plat

Township 39 N Range 1 - E

County \_\_\_\_\_

~~NE~~

W

6	5	4	3	2	1
7	8	9	10	11	12
18 ✓ ✓	17	16	15	14	13
✓ ✓ ✓ ✓					
✓ ✓ ✓ ✓	20	21	22	23	24
✓ ✓ ✓ ✓					
30	29	28	27	26	25
31	32	33	34	35	36

~~SE~~

L.—4493.

PLAINTIFF'S EXHIBIT No. 2.

Adm. E. M. H.

State of Idaho.

CERTIFICATE OF CLEARANCE.

No. 652.

THIS CERTIFIES That I have personally inspected the disposal of slash incident to the logging and cedar operations of J. M. Dungan of Spokane, Washington, on the following described tracts or parcels of Forest Land in Idaho, to-wit, a small area of about 15 acres in the South East corner of SE $\frac{1}{4}$ NW $\frac{1}{4}$ , and the South West corner of SW $\frac{1}{4}$ -NE $\frac{1}{4}$ , section 18, T. 39 N. R. 1, E. B. M.

Containing fifteen acres of slash, more or less.

This slash was made in the years of 1927 and 1928. The land is reputed to be owned by the Potlatch Lumber Company of Potlatch, Idaho.

THIS IS TO FURTHER CERTIFY That, as a result of such personal inspection, it is my opinion that the slash has been disposed of in accordance with the laws of the State of Idaho; with the rules and regulations of the State Cooperative Board of Forestry and with the written permit of the State Forester (if any) on — acres of above slashing area, described as follows:

IN WITNESS WHEREOF, I have hereunto affixed my signature this 7th day of December, 1928.

R. L. WOESNER,

Fire-Warden,

Potlatch Forest Protective District of the State of Idaho.

This CERTIFICATE OF CLEARANCE will be accepted by the State Cooperative Board of Forestry, or any Executive Committee thereof; by the State Forester and his Deputy; and by all Fire Wardens and their Deputies as *prima facie* evidence of the facts stated; Provided, however, that this Certificate of Clearance may be revoked, cancelled or disregarded by the State Cooperative Board of Forestry for any reason sufficient to said Board. [52]

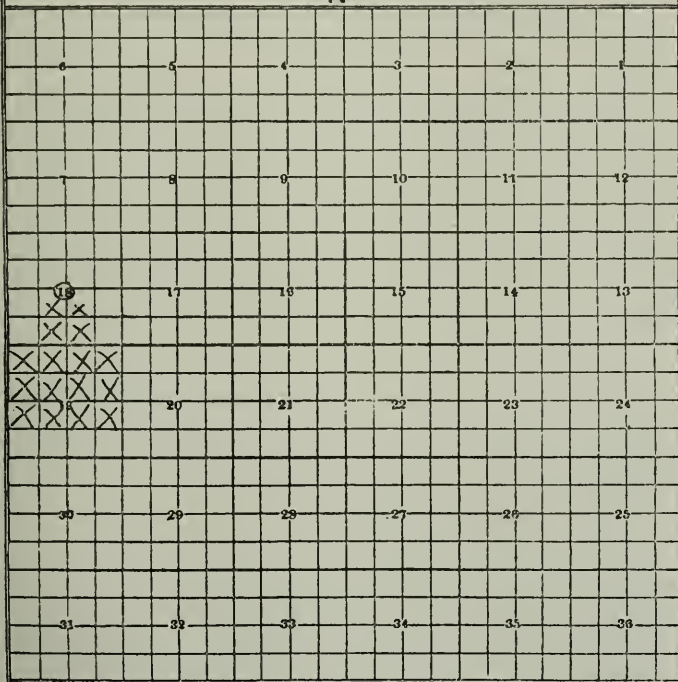
Form E.

Township Plat

Township 39 N Range 1 E

County \_\_\_\_\_

~~PE~~



52

52

52

L.—4493.

## PLAINTIFF'S EXHIBIT No. 3.

Adm. E. M. H.

State of Idaho.

## CERTIFICATE OF CLEARANCE.

No. 653.

THIS CERTIFIES That I have personally inspected the disposal of slash incident to the logging and cedar operations of J. M. Dungan of Spokane, Washington, on the following described tracts or parcels of Forest Land in Idaho, to-wit, SE $\frac{1}{4}$ NE $\frac{1}{4}$ , NE $\frac{1}{4}$ SW $\frac{1}{4}$ , N $\frac{1}{2}$ SE $\frac{1}{4}$ , SE $\frac{1}{4}$ SE $\frac{1}{4}$ , Section 24, T. 39 N. R. 1, W. B. M.

Containing 200 acres of slash, more or less.

This slash was made in the summer of 1928. The land is reputed to be owned by Annie E. Smith Stanley of Los Angeles, California, and A. H. Charles of Santa Rosa, Calif.

THIS IS TO FURTHER CERTIFY That, as a result of such personal inspection, it is my opinion that the slash has been disposed of in accordance with the laws of the State of Idaho; with the rules and regulations of the State Cooperative Board of Forestry and with the written permit of the State Forester (if any) on — acres of above slashing area, described as follows:

IN WITNESS WHEREOF, I have hereunto affixed my signature this 7th day of December, 1928.

R. L. WOESNER,

Fire-Warden,

Potlatch Forest Protective District of the State of Idaho.

This CERTIFICATE OF CLEARANCE will be accepted by the State Cooperative Board of Forestry, or any Executive Committee thereof; by the State Forester and his Deputy; and by all Fire Wardens and their Deputies as *prima facie* evidence of the facts stated; Provided, however, that this Certificate of Clearance may be revoked, cancelled or disregarded by the State Cooperative Board of Forestry for any reason sufficient to said Board. [54]

# Township Plat

Township 39 N Range 1 W

County \_\_\_\_\_

~~EE~~

6	5	4	3	2	1
7	8	9	10	11	12
18	17	16	15	14	13
19	20	21	22	23	24
30	29	28	27	26	25
31	32	33	34	35	36



~~EE~~



[Title of Court and Cause.]

NOTICE OF FILING OF PLAINTIFF'S BILL  
OF EXCEPTIONS.

To the Above-named Defendant and to Messrs.  
Wakefield & Witherspoon and Gray & Potts,  
Your Attorneys.

YOU AND EACH OF YOU are hereby notified  
that on the 26th day of March, A. D. 1930, plain-  
tiff filed in the office of the Clerk of the above-en-  
titled court their proposed bill of exceptions in said  
cause for use upon appeal of said cause to the Cir-  
cuit Court of Appeals, a copy of which proposed  
bill of exceptions is herewith served upon you.

O. C. MOORE,  
BRUCE BLAKE,  
Attorneys for Plaintiff.

Service of the above notice and of the proposed  
bill of exceptions mentioned therein, by delivery of  
true copies thereof, is hereby admitted this 26th  
day of March, A. D. 1930.

GRAY & POTTS,  
WAKEFIELD & WITHERSPOON,  
Attorneys for Defendant.

Filed Mar. 26, 1930. [56]

[Title of Court and Cause.]

ORDER APPROVING BILL OF EXCEPTIONS.

On this twenty-sixth day of April, 1930, the above cause came on for hearing on notice for the approving and settling of the proposed bill of exceptions, the plaintiffs appearing by one of their attorneys, Bruce Blake, and the defendant appearing by Harry T. Davenport, of the firm of Wakefield & Witherspoon, attorneys for the defendant; and it appearing that the bill of exceptions proposed by plaintiffs and lodged herein on the 26th day of March, 1930, and within the time provided for in the order of this court, and the said proposed bill of exceptions having been presented, filed and certified within the time allowed by said order, and no amendments thereto by the defendant having been offered and suggested, IT IS ORDERED that said proposed bill of exceptions heretofore filed by the plaintiffs in this case be and the same is hereby approved, allowed and settled as the true, full and correct bill of exceptions in this case and that the same as so settled and allowed be here and now certified accordingly by the undersigned, the Judge of this court who presided at the trial of this cause, and that said bill of exceptions when so certified be filed herein by the Clerk of the court, and the said Clerk is hereby directed to attach thereto all exhibits mentioned in said bill of exceptions which said exhibits are hereby made a part thereof. [57]

Done in open court this twenty-sixth day of April, 1930.

J. STANLEY WEBSTER,  
Judge.

It is hereby stipulated that the above and foregoing order may be signed without further notice.

Dated April 26, 1930.

O. C. MOORE,  
BRUCE BLAKE,  
Attorneys for Plaintiffs.  
GRAY & POTTS,  
WAKEFIELD & WITHERSPOON,  
Attorneys for Defendant.

Filed Apr. 26, 1930. [58]

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[Title of Court and Cause.]

#### ASSIGNMENT OF ERRORS.

Come now J. M. Dungan and Eunice Dungan, his wife, plaintiffs in the above cause, and make and file the following assignment of errors on which they will rely on their appeal to the United States Circuit Court of Appeals for the Ninth Circuit, for the review of the final judgment filed and entered herein against them on the 18th day of March, A. D. 1930.

#### I.

The Court erred in denying plaintiffs' motion to strike Paragraph 4 of defendant's further answer and counterclaim.

## II.

The Court erred in overruling plaintiffs' demurrer to the further answer and counterclaim set forth in defendant's answer to the complaint.

## III.

The Court erred in overruling plaintiffs' objection to introduction of testimony under defendant's further answer and counterclaim.

## IV.

The Court erred in permitting the introduction of testimony concerning and to establish the market value of No. 3 Common Rough Idaho White Pine lumber during the years 1926, 1927 and 1928.  
[59]

## V.

The Court erred in permitting the introduction of testimony with respect to the grades of lumber accepted and received by defendant from plaintiffs under the contract sued upon herein.

## VI.

The Court erred in holding and ruling that for No. 3 Rough Idaho White Pine lumber accepted and received by the defendant under its said contract in excess of 25% of the total cut and delivery plaintiff was not entitled to receive and defendant was not obligated to pay in excess of the current market price prevailing in the years in which deliveries were made.

## VII.

The Court erred in holding that the evidence in-

troduced by and on behalf of plaintiffs was and is legally insufficient to justify and sustain a judgment in favor of plaintiffs in accordance with the prayer of the complaint.

VIII.

The Court erred in holding that the evidence introduced by and on behalf of defendant was and is legally sufficient to justify and sustain the further answer and counterclaim.

IX.

The Court erred in finding (Special Finding No. 2) that of the total amount of lumber delivered by plaintiffs to defendant 2,299,971 ft. board measure was grade No. 3 Common Rough Idaho White Pine lumber.

X.

The Court erred in finding (Special Finding No. 5) that plaintiffs delivered to defendant and defendant received 780,851 ft. board measure of grade No. 3 Common Rough Idaho White Pine lumber in excess of 25% of the total amount of lumber cut and delivered.

XI.

The Court erred in finding (Special Finding No. 6) that [60] the excess of 780,851 ft. of grade No. 3 Common lumber was delivered as follows:

In the year 1926, 149,293 feet;

In the year 1927, 321,723 feet;

In the year 1928, 309,843 feet.

## XII.

The Court erred in finding (Special Finding No. 7) that the market value of the excess of grade No. 3 Common lumber at the place of delivery was as follows:

In the year 1926 the sum of \$15.50 per thousand feet Board measure;

In the year 1927 the sum of \$14.50 per thousand feet Board measure;

In the year 1928 the sum of \$13.50 per thousand feet Board measure.

## XIII.

The Court erred in finding (Special Finding No. 8) that the difference between the market value of the excess of grade No. 3 Common lumber delivered, and the contract price, is the sum of Fourteen Thousand Two Hundred Sixteen and 02/100 (\$14,216.02) Dollars.

## XIV.

The Court erred in finding (Special Finding No. 9) that the defendant is entitled to set off against the demand of the plaintiffs the said sum of Fourteen Thousand Two Hundred Sixteen and 02/100 (\$14,216.02) Dollars under its counterclaim.

## XV.

The Court erred in finding, holding and adjudging in the final judgment entered herein that plaintiffs are not entitled to recover from the defendant on the cause of action stated in their complaint the sum of Fifteen Thousand Three Hundred Eight and 21/100 (\$15,308.21) Dollars.

## XVI.

The Court erred in finding, holding and adjudging in the final judgment entered herein that defendant is entitled to recover from the plaintiffs on its counterclaim the sum of Fourteen Thousand [61] Two Hundred Sixteen and 02/100 (\$14,216.02) Dollars, and that defendant is entitled to have said amount set off against the demand of plaintiffs.

## XVII.

The Court erred in finding, holding and adjudging in the final judgment entered herein that plaintiffs are only entitled to recover of and from defendant the sum of One Thousand Ninety-two and 19/100 (\$1,092.19) Dollars, with interest thereon at the rate of Six (6%) per cent per annum from the 12th day of August, 1928, amounting to One Hundred Four and 66/100 (\$104.66) Dollars, aggregating the sum of One Thousand One Hundred Ninety-six and 85/100 (\$1,196.85) Dollars, and their costs and disbursements herein expended, with interest on the judgment at the rate of Six (6%) per cent per annum from the date hereof.

## XVIII.

The Court erred in making and entering the final judgment appealed from herein, in that plaintiffs should have been thereby awarded the sum of \$15,308.21 with interest thereon at the legal rate from the 12th day of August, 1928, as prayed in their complaint, without any offset, counterclaim or reduction in favor of defendant.

WHEREFORE the plaintiffs pray that said errors be corrected; that the judgment of the District Court be reversed, set aside and held for naught, and that said District Court be directed to make and enter an amended or supplemental judgment pursuant to the statutes of the United States and the rules of practice and procedure prevailing therein, awarding judgment to plaintiffs in the amount prayed in their complaint.

O. C. MOORE,  
BRUCE BLAKE,  
Attorneys for Plaintiff.

Service of the foregoing assignment of errors is acknowledged at Spokane, Washington, this 19th day of May, 1930.

GRAY & POTTS,  
WAKEFIELD & WITHERSPOON,  
Attorneys for Defendant.

Filed May 19, 1930. [62]

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[Title of Court and Cause.]

#### PETITION FOR ALLOWANCE OF APPEAL.

The above-named plaintiffs, J. M. Dungan and Eunice Dungan, his wife, conceiving themselves to be aggrieved by the final judgment made and entered by the Court in the above cause on the 18th day of March, A. D. 1930, whereby they were awarded \$1,092.19, together with interest and costs,



said award being the excess of plaintiffs' demand above the amount demanded by defendant's cross-complaint, does hereby appeal from said judgment and the whole thereof to the United States Circuit Court of Appeals for the Ninth Circuit, and pray that this appeal be allowed for the reasons specified in the assignment of errors filed herewith, and that a transcript of so much and such portions of the record and proceedings in said cause upon which said final judgment was made as may be necessary and essential to a review of the question by this appeal, duly authenticated, be sent to the said United States Circuit Court of Appeals for the Ninth Circuit in order that the errors complained of may be reviewed and, if error be found, corrected according to the laws and customs of the United States.

And your petitioners further pray for the entry of an order fixing the amount of the bond to be furnished by them as a condition to such appeal and for such other and further orders as may be requisite.

O. C. MOORE,  
BRUCE BLAKE,  
Attorneys for Plaintiffs.

Service of the above petition for allowance of appeal is acknowledged at Spokane, Washington, this 19th day of May, 1930.

GRAY & POTTS,  
WAKEFIELD & WITHERSPOON,

Attorneys for Defendants. [63]

Filed May 19, 1930. [64]

[Title of Court and Cause.]

ORDER ALLOWING APPEAL.

On reading and filing the petition of plaintiffs for an order allowing an appeal to the United States Circuit Court of Appeals for the Ninth Circuit, for the review and correction of the alleged errors in the proceedings leading up to and involved in the final judgment made and entered in said cause on the 18th day of March, A. D. 1930, and the assignments of error filed by plaintiffs in that connection, it is hereby ordered that an appeal from said judgment be and is hereby allowed as prayed and that a certified transcript of so much and such portions and parts of the record, testimony, exhibits and proceedings herein and upon which said judgment is based as may be essential to a review and determination thereof on such appeal, duly authenticated, be forthwith transmitted to the United States Circuit Court of Appeals for the Ninth Circuit, and,

IT IS FURTHER ORDERED that the bond on appeal be and is hereby fixed at the sum of \$500.00.

Done in open court this 19th day of May, A. D. 1930.

J. STANLEY WEBSTER,  
Judge.

Service of the above order allowing appeal is acknowledged at Spokane, Washington, this 19th day of May, 1930.

GRAY & POTTS,  
WAKEFIELD and WITHERSPOON,  
Attorneys for Defendant.

Filed May 19, 1930. [65]

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[Title of Court and Cause.]

#### BOND ON APPEAL.

KNOW ALL MEN BY THESE PRESENTS, That J. M. Dungan and Eunice Dungan, his wife, and United States Fidelity & Guaranty Company, a corporation, as surety are held and firmly bound unto Potlatch Lumber Company, a corporation, in the full and just sum of Five Hundred (\$500.00) Dollars to be paid to the said Potlatch Lumber Company, for which payment, well and truly to be made, we bind ourselves and each of our heirs, administrators, executors, successors and assigns, firmly by these presents.

Signed and sealed and dated this 19th day of May, 1930.

WITNESSETH, That whereas lately at the September, 1929, term of the District Court of the United States in and for the Eastern District of Washington, Northern Division, in a suit pending in said court between J. N. Dungan and Eunice Dungan, his wife, were plaintiffs and Potlatch

Lumber Company, a corporation, defendant, a final judgment was entered in favor of the plaintiff in the sum of One Thousand Ninety-Two and 19/100 (\$1092.19) Dollars with interest and costs, and whereas the plaintiff has obtained an order allowing an appeal to reverse said judgment in the aforesaid suit and a citation directed to the said Potlatch Lumber Company, a corporation, is about to be issued citing it to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit to be [66] holden in the city of San Francisco, thirty days from and after the filing of said citation,—

NOW, THEREFORE, the condition of the above obligation is such that after the said J. M. Dungan and Eunice Dungan, his wife, shall prosecute their appeal to effect and answer all damages and costs that may be awarded against them, if they fail to make their plea good, then the above obligation to be void; otherwise to remain in full force and effect.

J. M. DUNGAN,  
EUNICE DUNGAN,

Principals.

UNITED STATES FIDELITY & GUAR-  
ANTY COMPANY,

[Corporate Seal] WILLIS E. MAHONEY,  
Surety.

Defendant is satisfied with the within bond and the surety thereon.

GRAY & POTTS,  
WAKEFIELD & WITHERSPOON,  
Attorneys for Defendant.

The foregoing bond is approved as to form, amount and sufficiency of surety, this 19th day of May, 1930.

J. STANLEY WEBSTER,  
Judge of the United States District Court for the  
Eastern District of Washington, Northern Di-  
vision.

Due service of a copy of the above bond is ad-  
mitted at Spokane, Washington, this 19th day of  
May, 1930.

WAKEFIELD & WITHERSPOON,  
Attorneys for Defendant. [67]

Filed May 19, 1930. [68]

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[Title of Court and Cause.]

#### CITATION.

The President of the United States to the Potlatch  
Lumber Company, a Corporation:

You are hereby cited and admonished to be and  
appear in the United States Circuit Court of Ap-  
peals for the Ninth Circuit to be held at the city of  
San Francisco within thirty (30) days from the  
date of this writ, pursuant to an appeal filed in the  
Clerk's office of the District Court of the United  
States for the Eastern District of Washington,  
Northern Division, wherein J. M. Dungan and Eu-  
nice Dungan, his wife, are the appellants and you  
are respondent, to show cause, if any there be, why  
the judgment in said appeal mentioned should not

be corrected and speedy justice should not be done to the parties in that behalf.

WITNESS the Hon. CHARLES EVANS HUGHES, Chief Justice of the Supreme Court of the United States of America, this 19th day of May, A. D. 1930, and of the Independence of the United States the One Hundred and Fifty-fourth.

J. STANLEY WEBSTER,  
United States District Judge.  
Attest: EVA M. HARDIN,  
Clerk of Court.

Service of the within citation by delivery of copy admitted this 19th day of May, A. D. 1930.

GRAY & POTTS and  
WAKEFIELD & WITHERSPOON,  
Attorneys for Defendant.

Filed May 19, 1930. [69]

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[Title of Court and Cause.]

**PRAECIPE FOR TRANSCRIPT OF RECORD.**

Please prepare and certify to the United States Circuit Court of Appeals, Ninth Circuit, the following records, files and papers in the above-entitled action, for use in connection with plaintiffs' appeal:

1. Complaint.
2. Answer.
3. Order on demurrer to and motion to strike from affirmative answer.
4. Reply.

5. Amendments to answer.
6. Stipulation waiving jury.
7. Plaintiffs' request for findings of fact.
8. Findings proposed by plaintiffs.
9. Special findings of fact.
10. Judgment.
11. Order extending term.
12. Bill of exceptions.
13. All exhibits admitted in evidence.
14. Notice of filing of bill of exceptions.
15. Order settling bill of exceptions.
16. Assignment of errors.
17. Petition for allowance of appeal. [70]
18. Order allowing appeal.
19. Bond on appeal.
20. Citation.
21. Praecipe for transcript of record.

O. C. MOORE.

BRUCE BLAKE.

Filed May 19, 1930. [71]

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[Title of Court and Cause.]

CERTIFICATE OF CLERK U. S. DISTRICT  
COURT TO TRANSCRIPT OF RECORD.

United States of America,  
Eastern District of Washington,—ss.

I, Eva M. Hardin, Clerk of the District Court of  
the United States for the Eastern District of Wash-  
ington, do hereby certify that the foregoing type-

written pages, numbered 1 to 73, inclusive, to be a full, true, correct and complete copy of so much of the record, papers and all other proceedings in the above-entitled cause as are necessary to the hearing of the appeal therein, in the United States Circuit Court of Appeals, as called for by counsel of record herein, as the same remain of record and on file in the office of the Clerk of said District Court, and that the same constitute the record on appeal from the judgment of the District Court of the United States for the Eastern District of Washington, to the Circuit Court of Appeals for the Ninth Judicial Circuit, San Francisco, California.

I do further certify that I hereto attach and herewith transmit the original citation issued in this cause.

I do further certify that the fees of the Clerk of this court for preparing and certifying the foregoing typewritten [72] record amount to the sum of \$11.55, and that the same has been paid in full by Messrs. O. C. Moore and Bruce Blake, attorneys for plaintiffs.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court, at Spokane, in said District, this 12th day of June, A. D. 1930.

[Seal]

EVA M. HARDIN,

Clerk. [73]



[Endorsed]: No. 6166. United States Circuit Court of Appeals for the Ninth Circuit. J. M. Dungan and Eunice Dungan, His Wife, Appellants, vs. Potlatch Lumber Company, a Corporation, Appellee. Transcript of Record. Upon Appeal from the United States District Court for the Eastern District of Washington, Northern Division.

Filed June 14, 1930.

PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals  
for the Ninth Circuit.

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United States Circuit Court of Appeals for the  
Ninth Circuit.

No. 6166.

J. M. DUNGAN and EUNICE DUNGAN, His  
Wife,

Appellants,

vs.

POTLATCH LUMBER COMPANY, a Corpora-  
tion,

Appellee.

STIPULATION THAT DEMURRER TO FUR-  
THER ANSWER AND MOTION TO  
STRIKE PORTIONS OF SAID FURTHER  
ANSWER, ETC., BE MADE PART OF  
RECORD.

IT IS HEREBY STIPULATED by the parties to the above cause, acting by their respective counsel, that the demurrer to the further answer and counterclaim of defendant and the motion to strike portions of said further answer and counterclaim may be made a part of the transcript of the record on appeal when copies duly certified by the Clerk of the United States District Court for the Eastern District of Washington, Northern Division, are filed with the Clerk of the above-entitled court.

Dated this 9th day of July, 1930.

O. C. MOORE,

BRUCE BLAKE,

Attorneys for Appellants.

GRAY & POTTS,

WAKEFIELD & WITHERSPOON,

Attorneys for Appellee.

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In the District Court of the United States for the  
Eastern District of Washington, Northern  
Division.

No. L.-4493.

J. M. DUNGAN and EUNICE DUNGAN, His  
Wife,

Plaintiffs,

vs.

POTLATCH LUMBER COMPANY, a Corpora-  
tion,

Defendant.

DEMURRER TO ANSWER.

Filed May 14, 1929.

Come now the plaintiffs and demur to the further answer and counterclaim set forth and alleged in the answer of the defendant to the complaint in the above-entitled action, for the reason and on the ground that same does not state facts sufficient to constitute a defense or counterclaim to said complaint.

O. C. MOORE,  
Attorney for Plaintiffs,  
Residence and P. O. Address:  
501 Peyton Building,  
Spokane, Washington.

Copy received this 23d day of April, 1929.

WAKEFIELD & WITHERSPOON,  
Attorneys for Defendant.

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In the District Court of the United States for the  
Eastern District of Washington, Northern  
Division.

No. L.-4493.

J. M. DUNGAN and EUNICE DUNGAN, His  
Wife,  
Plaintiffs,

vs.

POTLATCH LUMBER COMPANY, a Corpora-  
tion,  
Defendant.

## MOTION TO STRIKE.

Filed May 14, 1929.

Come now the plaintiffs and move the Court for an order striking from the further answer and counterclaim of defendant in the above-entitled action as follows:

## I.

Striking Paragraph II for the reason and on the ground that the matters and things alleged in said paragraph are irrelevant, immaterial and evidentiary, and for the further reason that this court is governed exclusively in matters of the character involved by general principles and rules of law as enunciated by the Supreme Court of the United States and other appellate federal courts.

## II.

Striking Paragraph III for the reason and on the ground that the matters and things alleged in said paragraph are irrelevant, immaterial and evidentiary, and for the further reason that this court is governed exclusively in matters of the character involved by general principles and rules of law as enunciated by the Supreme Court of the United States and other appellate federal courts, and for the further reason that this court will, in so far as relevant and material, take judicial notice of the laws of Idaho.

## III.

Striking Paragraph IV for the reason and on

the ground that the matters and things set forth and alleged therein are irrelevant, immaterial and repetitious.

IV.

Striking Paragraph V for the reason and on the ground that same does not allege any fact but mere conclusions of the pleader and is irrelevant and immaterial.

O. C. MOORE,  
Attorney for Plaintiffs.  
Residence and P. O. Address:  
501 Peyton Building,  
Spokane, Washington.

Copy received this 23d day of April, 1929.

WAKEFIELD & WITHERSPOON,  
Attorneys for Defendant.

United States of America,  
Eastern District of Washington,—ss.

I, Eva M. Hardin, Clerk of the District Court of the United States for the Eastern District of Washington, do hereby certify that I have compared the foregoing copy with the original demurrer to answer and motion to strike, in Cause No. L-4493, J. M. Dungan and Eunice Dungan, his wife, plaintiffs, vs. Potlatch Lumber Company, a corporation, defendant, in the foregoing entitled cause, now on file and of record in my office at Spokane and that the same is a true and perfect transcript of said original and of the whole thereof.

WITNESS my hand and the seal of said court  
this 9th day of July, 1930.

[Seal]

EVA M. HARDIN,  
Clerk.

By \_\_\_\_\_,  
Deputy.

[Endorsed]: Filed Jul. 11, 1930. Paul P.  
O'Brien, Clerk.